

7-16-2012

# Platz v. State Appellant's Brief 2 Dckt. 39805

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IN THE SUPREME COURT OF THE  
STATE OF IDAHO

IN THE MATTER OF THE DRIVING )  
LICENSE PRIVILEGES OF CHAUNCEY )  
JACK PLATZ )

CHAUNCEY JACK PLATZ, )

Petitioner-Respondent, )

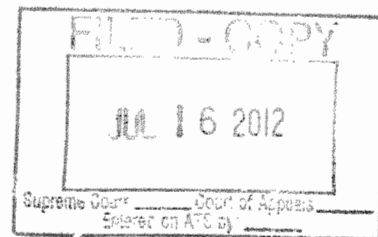
v. )

STATE OF IDAHO, DEPARTMENT )  
OF TRANSPORTATION, )

Respondent-Appellant. )

Supreme Court No. 39806-2012

APPELLANT'S BRIEF



APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY

THE HONORABLE JOHN R. STEGNER, PRESIDING

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## **I. STATEMENT OF THE CASE**

### **a. Nature of the Case.**

C. Jack Platz originally asked the District Court to review the decision of the Department's Hearing Examiner, Michael B. Howell disqualifying Mr. Platz's Commercial Driving Privileges for one year as a result of Mr. Platz's failure of an evidentiary test for alcohol concentration pursuant to I.C. § 49-335.

### **b. Party References.**

The Idaho Transportation Department is referred to as the "Department" for purposes of this argument. Mr. Platz is specifically referred to by name. Where "driver" is used, it is in reference to a hypothetical or to drivers generally.

### **c. Reference to the Administrative Record.**

The references to the Department's Administrative Record are made to the Appellate Record page number not the Administrative Record page number. The Transcript of the Administrative hearing is included in the Record on Appeal as an exhibit.

### **d. Factual Statement and Procedural History.**

Chauncey Jack Platz was notified on July 5, 2011 that the Idaho Transportation Department intended to disqualify him from the operation of Commercial Motor Vehicle as a result of his failure of evidentiary testing for breath alcohol (R. p. 027).

Mr. Platz requested a hearing with the Idaho Department of Transportation's Hearing Examiner to consider the proposed Commercial Driver's License Disqualification (R. p. 028).

A hearing pursuant to notice was held telephonically before the Department's Hearing Examiner on September 27, 2011 (R. p. 033).

The Hearing Examiner entered Findings of Fact, Conclusions of Law and Preliminary Order sustaining the Administrative disqualification of Mr. Platz's Commercial driving privileges on September 30, 2011 (R. p. 039-041).

Mr. Platz timely filed a Petition for Judicial Review and the disqualification has been stayed pending the Court's review.

The District Court entertained briefing and heard oral argument on February 16, 2012.

Upon setting aside the Administrative License Suspension (See ISC Case #39805-2012), the District Court set aside the disqualification of Mr. Platz's Commercial Driving Privileges (R. pp. 082-083).

The Department timely filed an Appeal from the District Court's Decision.

## **II. ISSUES ON APPEAL**

1. Mr. Platz was not denied Due Process.
2. The Department's Hearing Examiner's Decision was supported by sufficient relevant evidence in the Record.

## **III. STANDARD OF REVIEW**

The review of disputed issues of fact must be confined to the agency record for judicial review. Idaho Code § 67-5277.

Idaho Code § 67-5279(1) sets out the scope of review. "The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Howard v. Canyon County Bd. of Com'rs*, 128 Idaho 479, 915 P.2d 709 (1996).

Idaho Code § 67-5279(3) provides:

When the agency was required by the provisions of this chapter or by other provision of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

The appropriate remedy pursuant to the Idaho Administrative Procedures Act is:

“. . . if the agency action is not affirmed, it shall be set aside, in whole or in part and remanded for further proceedings as necessary.” Idaho Code § 67-5279(3).

The decision of the Transportation Department must be affirmed unless the order violates statutory or constitutional provisions, exceeds the agency's authority, is made upon unlawful procedure, is not supported by substantial evidence or is arbitrary, capricious or an abuse of discretion, *Marshall v. Department of Transp.*, 137 Idaho 337, 48 P.3d 666 (2002). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of that party has been prejudiced. *Druffel v. State, Dept. of Transp.*, 136 Idaho 853, 41 P.3d 739 (2002).

Appellate review of the District Court's decision requires the Court to review “the agency record independently of the District Court's decision”, *Marshall v. Dept. of Transp.* 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002).

#### **IV. ARGUMENT**

*Mr. Platz was not denied Due Process.*

Mr. Platz was given notice of a telephonic hearing to consider the disqualification of his Commercial Driving Privileges.



Mr. Platz was represented by Counsel at the September 27, 2011 telephone hearing on the Department's proposed disqualification from the operation of Commercial Motor Vehicles pursuant to I.C. § 49-335(2).<sup>1</sup>

The Hearing Examiner indicates that Mr. Platz had two choices pursuant to I.C. § 49-335, proceed with the hearing on the Commercial Driver's License disqualification or the settle the Record permitting Hearing Examiner's decision based on the Department's Record created without objection by Mr. Platz.<sup>2</sup>

The Hearing Examiner does not deny Mr. Platz the opportunity to put submit such evidence that Mr. Platz considered relevant instead, the Hearing Examiner indicates that there are choices in the I.C. § 49-335 hearing process that Mr. Platz can make given the fact that Mr. Platz had failed a blood alcohol evidentiary test pursuant I.C. § 18-8002A (CDL Tr. p. 3).

The Hearing Examiner indicates that he is likely to sustain the Commercial Driver's Disqualification based upon the fact that Mr. Platz has Commercial Driving Privileges, that Mr. Platz failed an evidentiary test for alcohol concentration and suffered

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<sup>1</sup> Idaho Code § 49-335(2) provides the following:

Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle.

2

14 I'm not going to give you any legal advice, but basically my  
15 experience from past cases is, you know, a review of this is I  
16 would probably sustain your client's commercial  
17 disqualification at this point and then you could add that to  
18 the appeal, and you would have it all down in one fell swoop.  
19 If you – if you don't, then you've got this sort of hanging  
20 out in limbo until – until the administrative license appeal  
21 comes down.

CDL Tr., p. 4 LL. 14-21.

an Administrative License Suspension. Those factual findings are clearly supported by the Record. After the Hearing Examiner walked Mr. Platz's counsel through the alternatives, Mr. Platz's counsel indicates "that's what I'd like you to do and I appreciate your guidance on this" (CDL Tr. p. 5 LL. 24-25).<sup>3</sup>

The question pursuant to I.C. § 49-335 is whether Mr. Platz has Commercial Driving Privileges and whether he failed an evidentiary test for blood alcohol content. The Hearing Examiner specifically finds that Mr. Platz has commercial driving privileges and had failed an evidentiary test (R. pp. 045-046). There is no evidence submitted to the Hearing Examiner that Mr. Platz did not fail an evidentiary test. The process due Mr. Platz is not implicated by Mr. Platz's knowing and intelligent decisions about what course of action to take.

Mr. Platz was clearly free to create the necessary Record to show that an evidentiary test for alcohol concentration had not been failed based upon the provisions of I.C. § 18-8002A. Mr. Platz knowingly and willingly determined that he would submit the matter to the Hearing Examiner based on the then existing record.

Mr. Platz was free to submit evidence for the Hearing Examiner's consideration that may well have been determined by the Hearing Examiner not to be relevant which would have permitted the Court upon judicial review to make a determination whether the Hearing Examiner should have considered the offered evidence. However when the Hearing Examiner is not offered an opportunity to consider the evidence even if the

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<sup>3</sup> Mr. Platz argued to the District Court the effect of the Court of Appeals decision in *Wanner v. State, Dept. of Transp.* 150 Idaho 164, 244 P.3d 1250 (2011), where the Court found that the Commercial Driver's License disqualification "is a consequence of the failed evidentiary test that is independent and distinct from the suspension of Wanner's license under 18-8002A." but this argument is not made to the Hearing Examiner.

Hearing Examiner indicates that such evidence may not relevant, there is nothing for the Court's review.

Mr. Platz received "an opportunity to be heard at a meaningful time in a meaningful manner" *Mathews v. Eldridge* 424 U.S. 319 at 333 (1976).<sup>4</sup> There are sufficient procedural protections in place based upon the process provided Mr. Platz.

Here Mr. Platz was given notice of a hearing, had counsel appear on his behalf and was aware of what information had been provided for purposes of creating the initial Administrative Record.

The Department provided Mr. Platz with a hearing before a neutral and disinterested Hearing Examiner.<sup>5</sup>

The private interest here is Mr. Platz's Commercial Driving Privileges. There is little risk of an "erroneous deprivation" based on the process provided Mr. Platz. Mr. Platz offers no additional or procedural safeguards for the Court's consideration. Mr. Platz only argues for a different result not a different process.<sup>6</sup>

The Hearing Examiner was not encouraged to come to a different conclusion and was not presented evidence as to why the Hearing Examiner should not rely on the

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Due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

<sup>5</sup> No challenge has been made that the Hearing Examiner was biased, unduly influenced or wrong in his interpretation of his role.

<sup>6</sup> The Idaho Court has never found the Department's telephonic hearing process to be constitutionally suspect, *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Ct. App. 2006) nor has the CDL Suspension process been successfully challenged, *Buell v. Idaho Dept. of Transp.* 151 Idaho 257, 254 P.3d 1253 (Ct. App. 2011).

Department's Records that an evidentiary test for breath alcohol had been failed by Mr. Platz.

The public interest implicated here is substantial. The Idaho Court's considering the *Mathews* factors in the context of Administrative License Suspension hearings have found a substantial public interest, *Bell v. Idaho Transp. Dept.* 151 Idaho 659, 262 P.3d 1030 (2011).<sup>7</sup>

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Idaho's appellate courts have considered the *Mathews* factors in the context of administrative license suspension hearings and have found that while an individual does have a substantial interest in his or her license, that interest may be subordinated by the State's interest in preventing intoxicated persons from driving, particularly where the individual is entitled to review procedures. See *Ankney*, 109 Idaho at 4–5, 704 P.2d at 336–37 (concluding that the then-applicable statute, I.C. § 49–352, which enabled a police officer to seize a person's driver's license prior to a hearing, did not violate procedural due process because there was not a high risk of erroneous deprivation where the statute provided for a prompt post-seizure review, coupled with the requirement that the police officer requesting the evidentiary test have reasonable grounds to believe the driver is intoxicated); see also *In re McNeely*, 119 Idaho 182, 190–91, 804 P.2d 911, 919–20 (Ct.App.1990) (concluding that the notice provided by the advisory form, as set forth in the applicable statute, did not violate the driver's procedural due process).

*Bell v. Idaho Transp. Dept.*, 151 Idaho 659, 262 P.3d 1030, 1036 (2011).

The Hearing Examiner did not hear the due process complaints made to the District Court. Mr. Platz did not object to the Hearing procedure suggested by the Hearing Examiner and simply wants the Court to conclude that the procedures he knowingly participated in without objection violates due process. The Court in *Bell* rejects this analysis, declining to resolve an issue on appeal, that was not raised for the Hearing Examiner, *Bell* at 262 (Citing *Viveros v. State Dept. of Health and Welfare*, 126 Idaho 714, 889 P.2d 1104 (1995)). Such is the case here, Mr. Platz now argues to the Court something that was not presented to the Hearing Examiner.<sup>8</sup>

Mr. Platz really just makes a policy argument that the Idaho Transportation Department should not disqualify Mr. Platz from the operation of a Commercial Motor Vehicle based on his failure of an evidentiary test. That Legislative decision to disqualify Mr. Platz's Commercial driving privileges is not before the Court on Judicial Review, I.C. § 67-5270.

Finally, Mr. Platz has not shown that the conduct of the hearing is anything other than harmless error. I.R.C.P. 61 directs that the Court should disregard error which does not affect the substantial rights of Mr. Platz. Here the substantial right of Mr. Platz is the right to a hearing prior to his Commercial Driving Privileges being disqualified. Mr. Platz cannot claim now there is any error or misconduct; when Mr. Platz does not submit evidence for the Hearing Examiner's consideration. The Hearing Examiner is entitled to consider the evidence of the failed evidentiary test for purposes of disqualifying Mr. Platz from the operation of a Commercial Motor Vehicle.

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<sup>8</sup> The Court, reviewing a Hearing Officer's decision denying Medicaid coverage for a medical procedure, considered whether making arguments in closing argument to the Hearing Officer were sufficient to preserve the issue for judicial review. The Court concludes that such arguments were not presented for review when the arguments were advanced for the first time on appeal at 717. *Viveros v. State Dept. of Health and Welfare*, 126 Idaho 714, 889 P.2d 1104 (1995).

The information supplied to Mr. Platz by the Hearing Examiner to the extent that it affected the “conduct” of the hearing and not Mr. Platz’s Commercial Driving Privileges, was at worst, harmless error. Mr. Platz does not have a “substantial right” to a different hearing process without offering to the Court a showing of how the hearing should be conducted differently, (particularly considering that Mr. Platz had the burden). *Myers v. Workmen’s Auto Ins. Co.* 140 Idaho 495, 95 P.3d 977 (2004). Further, Mr. Platz does not demonstrate to the Court what evidence could have been considered by the Hearing Examiner which Mr. Platz argued could have produced a different result.

Mr. Platz received an opportunity to be heard, at a reasonable time, in a meaningful manner, receiving such process due him.

## **ISSUE II**

*The Department’s Hearing Examiner’s Decision was supported by sufficient relevant evidence in the Record.*

Here the Record reflects that Mr. Platz had Commercial Driving Privileges and failed an evidentiary test for breath alcohol. Mr. Platz does not create a record which permits the Court to review whether the evidence which was not offered was relevant. However, even if the evidence not offered should have been relevant, the Court is required to sustain the disqualification if the Hearing Examiner’s decision is based on substantial evidence in the Record, I.C. § 67-5279.

The Hearing Examiner made a decision based upon the Record before him.

The Department’s Hearing Examiner considered that Mr. Platz had failed an evidentiary test for alcohol concentration. Mr. Platz did not contest that he had failed an evidentiary test for alcohol concentration, only that there was a basis to believe that the

evidentiary test result was a product of testing procedures that would not comply with I.C. § 18-8004.

The two administrative processes for the suspension (I.C. § 18-8002A7) or disqualification of Mr. Platz's driving privileges (I.C. § 49-335) are separate processes. The failure of an evidentiary test administered pursuant to I.C. § 18-8002A(7) will result in the disqualification of Commercial Driving Privileges pursuant to I.C. § 49-335.

Mr. Platz's Notice of Disqualification was dated July 5, 2011 disqualifying Mr. Platz from the operation of a commercial vehicle from July 26, 2011 until July 26, 2012. Mr. Platz requested an administrative hearing on September 8, 2011 and the hearing was held on September 27, 2011.

The interplay of the Administrative License Suspension and the Commercial Driving Privileges Disqualification are addressed in *Wanner v. State, Dept. of Transp.*, 150 Idaho 164, 244 P.3d 1250 (2010).

The District Court hearing Mr. Platz's judicial review concluded that the Administrative License Suspension should be set aside (that matter is presently on appeal in Idaho Supreme Court Case # 39805-2012).

Consistent with the relationship of the Administrative License Suspension and the disqualification of the Commercial Driving Privileges, the Hearing Examiner found that Mr. Platz had failed an evidentiary test for alcohol concentration administered pursuant to I.C. §18-8002A(7) and that Mr. Platz had Commercial Driving Privileges.<sup>9</sup> Those are the only facts necessary for the Hearing Examiner to address in the proposed disqualification of Mr. Platz's Commercial Driving Privileges.<sup>10</sup>

The Department by this argument is not suggesting that inconsistent results in the Administrative License Suspension case and the Commercial Driver's License Disqualification would be acceptable. If the Administrative License Suspension is set aside by the reviewing Court, then there is no failed evidentiary testing for purposes of the disqualification pursuant to I.C. § 49-335.

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2 HEARING OFFICER: Basically, what this – this  
3 hearing is pursuant to 49-335, and the only issue before me is  
4 whether or not your client has committed an offense under  
5 49-335 that would mandate a disqualification of his commercial  
6 driving privileges; and that would be that he has an ALS  
7 suspension, that he's been convicted of DUI, you know, the  
8 things that are set forth in 49-335.

9 So the only thing I'm looking at is if there –  
10 is there a current unvacated suspension for administrative  
11 license suspension, and this case, it appears that there is.  
12 And so if – if – unless you've got proof that that suspension  
13 was set aside –

CDL Transcript, p. 3, LL. 2-13.

10

In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. *Kinney v. Tupperware Co.*, 117 Idaho 765, 769, 792 P.2d 330, 334 (1990). Substantial evidence is more than a scintilla, but less than a preponderance. *Id.*

*Masterson v. Idaho Dept. of Transp.*, 150 Idaho 126, 128, 244 P.3d 625, 627 (Ct. App. 2010)



The Hearing Examiner's Disqualification of Mr. Platz's Commercial Driving Privileges is supported by sufficient evidence in the Record and should be sustained.

**V. CONCLUSION**

Mr. Platz has received the process due him.

The Hearing Examiner's Findings and Conclusions are based on substantial evidence in the record and should be confirmed by the Court.

Mr. Platz has not met his burden.

Mr. Platz should be disqualified from the operation of a commercial vehicle for one year.

Respectfully Submitted this 12 day of July 2012.



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Edwin L. Litteneker  
Special Deputy Attorney General

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To:

James E. Johnson  
604 S. Washington St. #3  
Moscow, Idaho 83843

On this 12 day of July, 2012.



Edwin L. Litteneker